



May 9, 2016

Director John M Huff
Director
Department of Insurance, Financial Institutions & Professional Registration
Truman State Office Building
Room 530
P.O. Box 690
Jefferson City, MO 65102

Re: Public Hearing for Aetna-Humana Merger

Dear Director Huff:

The undersigned organizations represent consumers and workers across the state and nation. We write regarding the proposed Aetna-Humana merger and its potential impact on Missouri health insurance markets. The proposed merger would combine two of the nation’s five largest insurers.¹ We are concerned that the merger of these dominant insurers could substantially lessen competition and harm millions of consumers in Missouri. We understand that the Missouri Department of Insurance, Financial Institutions & Professional Registration (“DIFP”) is currently reviewing the proposed merger. We appreciate the thoughtful and deliberative process being undertaken by DIFP in holding a public hearing as well as its commitment to allowing the public to weigh in on this transaction through comments.² We urge DIFP to take appropriate action under its authority to protect competition and consumers.

As we explain further below, we are concerned that:

- the merger is likely to substantially harm consumers in the Medicare Advantage, fully insured group, and Medicare Part D markets, especially by eliminating potential competition between Humana and Aetna;

¹ The other three national insurers are UnitedHealthcare, Anthem, and Cigna. Anthem and Cigna have also proposed a merger that is currently pending and under review.

² Press Release, *Department to hold public hearing on Aetna's proposed acquisition of Humana*, Department of Insurance, Financial Institutions & Professional Registration, available at http://difp.mo.gov/news/2016/Department_to_hold_public_hearing_on_Aetna_s_proposed_acquisition_of_Humana.

- in particular, the combined market share of 52% in Medicare Advantage is well above levels that the Supreme Court has considered to be undue market concentration that undermines competition and harms consumers;
- the history of past rate increases and consumer protection violations by Aetna and Humana increases the likelihood of competitive harms;
- the merger will likely lead to higher premiums based on what has happened in past mergers;
- any potential efficiencies that might result from the merger will not overcome the likely competitive harm from the merger; and
- past remedies that attempted to correct problems from problematic mergers have failed.

Finally, we address possible remedies that DIFP might consider to protect consumers and the public interest if the parties are able to provide sufficient evidence to overcome the *prima facie* evidence of violation of the competitive standards and the merger is permitted.

Under Missouri law, the Director, after a public hearing, is authorized to prevent any merging insurer from doing business in the state if “there is substantial evidence that the effect of the acquisition may be substantially to lessen competition in any line of insurance in this state or tend to create a monopoly therein.”³ In assessing if a health insurance merger substantially lessens competition, the statute states that it is *prima facie* evidence of a violation of the competitive standards if there is a significant trend toward concentration in the product and geographical market, one of the merging insurers is in a grouping of the two to eight largest insurers in the market, and the other has a market share of 2% or more.⁴ The relevant Missouri statute also states that it is *prima facie* evidence of a violation if the merger is between a company with 19% or more and a company with 1% or more of a market or a company with 15% or more and a company with 1% or more in a highly concentrated market.⁵ Even absent such a showing of *prima facie* evidence, the Commissioner “may establish the requisite anticompetitive effect based upon other substantial evidence.”⁶ The approach taken by the statute is consistent with the Horizontal Merger Guidelines⁷ and with approaches taken in other state insurance statutes.⁸

I. The Merger of Aetna and Humana Could Have a Substantial Harmful Impact on Missouri’s Insurance Markets and Consumers

Protecting health insurance competition is crucial to promoting affordable health care. The Missouri health insurance markets are already competitively fragile. The Kaiser Family Foundation studied the Missouri commercial insurance markets and found them moderately to highly concentrated with Herfindahl-Hirschman Indexes (“HHIs”) of 2,116, 3,135, and 2,455 in

³ M.R.S. § 382.095.4-5.

⁴ M.R.S. § 382.095.4(2)(b).

⁵ M.R.S. § 382.095.4(2)(a).

⁶ M.R.S. § 382.095.4(4).

⁷ See U.S. Department of Justice & FTC, Horizontal Merger Guidelines (2010).

⁸ E.g., O.C.G.A. §33-13-3.

the individual, small group, and large group markets respectively.⁹ The antitrust enforcement agencies generally consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated, warranting a closer look at new proposed mergers, and consider markets in which the HHI is in excess of 2,500 points to be highly concentrated, warranting even closer scrutiny.¹⁰ Highly concentrated markets are problematic because “[w]hen there is little or no competition, consumers are made worse off if a firm uses its market power to raise prices, lower quality for consumers, or block entry by entrepreneurs.”¹¹ Firms that do not face meaningful competition might be less willing to improve quality or variety, and may be less vigorous in pursuing cost reductions.¹²

In addition, the Medicare Advantage market is dominated by Aetna, Humana, and United-Healthcare, who have a combined market share of 83%.¹³ (Economic studies¹⁴ and a Department of Justice enforcement action have found that Medicare Advantage is a distinct market from traditional Medicare “[d]ue in large part to the lower out-of-pocket costs and richer benefits that many Medicare Advantage plans offer seniors over traditional Medicare.”¹⁵)

Loss of competition in Medicare Advantage. The merger would put an end to what could be significant existing and future competition between Aetna and Humana in Medicare Advantage. Medicare Advantage is a Medicare supplemental program used by over 310,000 Missouri Medicare beneficiaries.¹⁶

In Missouri, the merger would combine Aetna’s 30% of the Medicare Advantage market with Humana’s 22%, leading to a 52% market share.¹⁷ This is one of the more significant combinations of market share from the deal nationwide. In addition, many counties would be even more concentrated. Greene and Jackson Counties would be 61% and 80% controlled by the merged entity - two of 39 counties with a population over 10,000 nationwide that would be over

⁹ Insurance Market Competition, Kaiser Family Foundation, <http://kff.org/state-category/health-insurance-managed-care/insurance-market-competitiveness/>.

¹⁰ See U.S. Department of Justice & FTC, Horizontal Merger Guidelines § 5.2 (2010).

¹¹ Issue Brief, *Benefits of Competition and Indicators of Market Power* at 2, Council of Economic Advisors (April 2016), available at https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

¹² *Id.*

¹³ Gretchen Jacobson, Anthony Damico, and Tricia Neuman, *Data Note: Medicare Advantage Enrollment, by Firm, 2015*, KAISER FAMILY FOUNDATION (July 14, 2015), <http://kff.org/medicare/issue-brief/data-note-medicare-advantage-enrollment-by-firm-2015/>.

¹⁴ Anna D. Sinaiko & Richard Zeckhauser, *Persistent Preferences and Status Quo Bias Versus Default Power: The Choices of Terminated Medicare Advantage Clients* (Working Paper, Harvard University, 2015) (investigating beneficiary responses to the elimination of an MA plan found enrollees selected another MA plan rather than accepting the program default of enrollment under traditional Medicare); Anna D. Sinaiko & Richard Zeckhauser, *Medicare Advantage – What Explains Its Robust Health?*, *Am J Manag Care*. 2015;21(11):804-806, available at <http://www.hks.harvard.edu/fs/rzeckhau/Medicare%20Advantage.pdf> (examining the ongoing and increasing enrollment in MA plans, despite significant cuts in benefits following reforms under the Affordable Care Act, which suggests distinct consumer preferences for the package of benefits and managed care format of MA plans).

¹⁵ Competitive Impact Statement, *United States v. UnitedHealth Group Inc. and Sierra Health Services, Inc.*, No. 08- cv-322 (D.D.C. Feb. 25, 2008), available at www.justice.gov/atr/case/us-v-unitedhealth-group-inc-and-sierrahealth-services-inc.

¹⁶ Gretchen Jacobson, *supra* note 13.

¹⁷ Gretchen Jacobson, *supra* note 13.

50% controlled as a result of this deal.¹⁸ These shares are well over what the Supreme Court has found to be undue concentration. In *U.S. v. Philadelphia National Bank*, the Supreme Court stated, “Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.”¹⁹ The level of consolidation also exceeds the levels that have led to past Justice Department enforcement actions against proposed health insurance mergers.²⁰ And as indicated above, these market shares are *prima facie* evidence of a violation of the Missouri competitive standards.

Competition in Medicare Advantage is crucial for consumers and for taxpayers who help fund Medicare Advantage. Economic studies have shown that mergers among health insurers diminish competition, leading to increased premiums — not just premiums charged by the merging companies but also premiums charged by their rivals in the same market.²¹ And head-to-head competition between Aetna and Humana in particular has been a driving force for lower premiums and more affordable health care. A recent study by the Center for American Progress evaluated competition throughout the country. It found that where Aetna and Humana compete head to head — as in Missouri — premiums are lower.²² In particular, competition between Aetna and Humana lowers Aetna’s annual premiums by up to \$302, and lowers Humana’s annual premiums by \$43.²³ This direct competition will be lost through this merger.

Loss of potential competition in Medicare Advantage. We are concerned that the proposed merger would not only harm current competition, but would foreclose future competition as well. Aetna has been expanding its Medicare Advantage business and, absent this merger, we could expect Aetna to significantly increase its competition against Humana in Medicare Advantage. This increased competition would result in significant benefits to consumers.

Aetna and Humana have increasingly been entering each other’s territories and competing directly on Medicare Advantage products. The recent Center for American Progress study found that the number of overlap counties in the U.S. increased from 82 to 562 in the past three years.²⁴

¹⁸ *Id.*

¹⁹ *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363-64 (1963).

²⁰ Complaint at 8, *U.S. v. Humana Inc.*, No. 12-0464 (D.D.C. March 27, 2012) (challenging a merger with combined market shares of 40% and up); Complaint at 8, *United States v. UnitedHealth Group Inc.*, No. 05-2436 (D.D.C. Dec. 20, 2005) (challenging a merger with combined market shares of 33%); Complaint at 7, *United States v. Aetna Inc.*, No. 99-1398 (N.D. Tex. June 21, 1999) (challenging a merger with combined market shares of 42% and up).

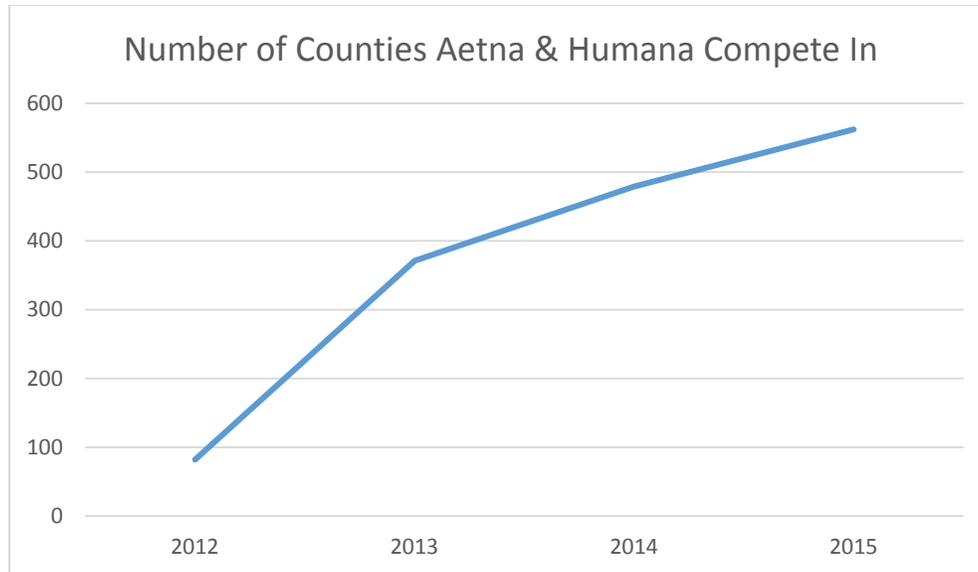
²¹ *See, e.g.,* Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

²² Topher Spiro, Maura Calsyn, & Meghan O’Toole, *Bigger Is Not Better: Proposed Insurer Mergers Are Likely to Harm Consumers and Taxpayers*, Center for American Progress (Jan. 21, 2015),

<https://www.americanprogress.org/issues/healthcare/report/2016/01/21/129099/bigger-is-not-better/>.

²³ *Id.*

²⁴ *Id.*



Based on Centers for Medicare & Medicaid Services data, Aetna and Humana already have competing Medicare Advantage contracts in approximately 57 Missouri counties.²⁵ But for this merger we could expect even greater expansion by Aetna leading to even greater competition and lower premiums for Missouri consumers.

The law is clear that the loss of potential competition is a sound reason to find a merger anticompetitive. As the Supreme Court observed in *United States v. Penn-Olin*, “[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.”²⁶

In the past, insurance commissioners have refused to approve health insurance mergers based on the loss of potential competition that would have resulted. For example, in 2007 the Pennsylvania Insurance Commissioner considered the merger between Pittsburgh-based Highmark and Philadelphia-based Independence Blue Cross. Even though there was little current competition between the two firms, the merger was rejected because of the potential that the firms might increasingly enter each other’s territories and compete.²⁷

Loss of Existing Competition in the Individual Medicare Part D Market. The merger between Aetna and Humana could substantially lessen competition within the Medicare Part D Market. According to DIFP’s 2014 Life Accident and Health Report, a combination of Aetna and Humana would result in an entity with a 33.2 percent market share of the Missouri

²⁵ See Medicare Advantage/Part D Contract and Enrollment Data, Centers for Medicare and Medicaid Services, available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAAdvPartDENrolData/index.html>.

²⁶ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964). See also *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082 (D.D.C. 1997); *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 116 (1975).

²⁷ See *Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP’T, http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#.Vkqhq_mrShc (last visited Jan. 8, 2015).

individual market.²⁸ The Aetna-Humana merger is a *prima facie* violation of the Missouri competitive standards in this market as well. We believe that detailed study of the merger's impact on the individual Medicare Part D market is warranted under the statute.

Loss of Existing Competition in the Fully Insured Employer Group Market. The merger between Aetna and Humana could substantially lessen competition within the fully insured employer group market. The merger would result in an entity with a 21.7 percent share of this Missouri market.²⁹ When combined with the announced Anthem-Cigna merger, the two new entities would be responsible for 54 percent of the market.³⁰ The Anthem-Cigna merger is a *prima facie* violation on its own, and the Aetna-Humana merger is just a fraction of a percent shy of a *prima facie* violation based on 2014 numbers. We believe that detailed study of the merger's impact on the fully insured employer group market is warranted under the statute, especially in regards to whether Aetna and Humana have passed the market share thresholds for *prima facie* violation in the time since 2014.³¹

History of Consumer Protection Violations Increases Reason for Competitive Concerns. Compliance with consumer protection provisions is crucial to ensuring a competitive market. Humana's and Aetna's recent compliance records both raise questions.

In January 2014, the DIFP found that Humana had violated numerous laws and regulations by limiting certain visits, misrepresenting its intended claims adjudication process, committing errors in the processing of denied claims, failing to process claims for services in compliance with requirements, applying copayments to members that exceeded 50% of the cost of providing any single service, and providing DIFP with incorrect information in responding to a complaint. DIFP required Humana to pay \$99,000 to the Missouri School State Fund, and take remedial action to fix all these violations.³² Humana has also committed other violations in the past few years.

In May 2015, DIFP found that Aetna also had violated numerous regulations by excluding coverage for applied behavioral analysis and therapies for the treatment of delays in development for diagnoses, excluding coverage for the treatment of autism spectrum disorders, and violating a

²⁸ 2014 Missouri Life, Accident, and Health Supplement Report: Statistics Section April 2015, Missouri Department of Insurance, Financial Institutions & Professional Registration, available at <http://insurance.mo.gov/reports/suppdata/documents/2014LifeAccidentandHealthReport.pdf>.

²⁹ See *Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Edmund F. Haislmaier, Heritage Foundation), available at <http://www.heritage.org/research/testimony/2015/effects-on-competition-of-proposed-health-insurer-mergers>.

³⁰ *Id.*

³¹ The fully insured employer group market, also known as the administrative services only ("ASO") market, is the fastest-growing portion of the health insurance industry and its products are increasingly purchased by small and medium sized companies. As such, the ASO market should be scrutinized every bit as carefully as other product markets. See Letter to Associate Attorney General William Baer, American Hospital Association (April 18, 2016), available at <http://www.aha.org/advocacy-issues/letter/2016/160418-let-hatton-baer.pdf>.

³² In the Department of Insurance, Financial Institutions and Professional Registration, State of Missouri: In Re: Humana Health Plan Inc, (NAIC #95885), Market Conduct Exam No. 1003-08-TGT. Jan. 13, 2014.

2012 order that required it to stop engaging in earlier violations of the law. DIFP ordered Aetna to pay a fine of \$4.5 million.³³ Aetna has also committed other violations in the past five years.

In addition, Humana has had significant problems in serving their customers that are national in scope. The Centers for Medicare and Medicaid Services (“CMS”) have recently fined Humana a substantial \$3.1 million for inappropriately delaying or denying coverage to elderly patients.³⁴ Humana “limited the quantity of prescription drugs available to Medicare consumers,” meaning “elderly patients who had legally obtained prescriptions from their physicians went to the pharmacy to pick up medications ‘and were delayed access to drugs, never received the drugs or incurred increased out-of-pocket costs.’”³⁵ Humana also violated Medicare appeals and grievances rules, including misclassifying denial of claims appeals as “customer service inquiries.”³⁶ CMS stated that “Humana’s failures in these areas were systemic and resulted in enrollees experiencing inappropriate delays or denials in receiving covered benefits or increased out-of-pocket costs.”³⁷ Aetna should assure the people of Missouri that these problems will be corrected.

II. The Merger Could Lead to Higher Consumer Costs in Missouri

Consumers are concerned that increased market power resulting from the merger of Aetna and Humana could lead to rising costs, i.e. higher premiums and out-of-pocket charges. As noted above, past economic studies demonstrate that health insurance mergers increase premiums -- not just those charged by the merging insurance companies, but also the premiums charged by their rivals in the same market.³⁸

History tells a compelling and unambiguous story – when insurers merge, consumers pay more. According to one health economics expert at the University of Southern California’s Schaeffer Center for Health Policy and Economics, “when insurers merge, there’s almost always an increase in premiums.”³⁹ Two separate, retrospective economic studies on health insurance mergers found significant premium increases for consumers post-merger. One study found that the 1999 Aetna-Prudential merger resulted in an additional seven percent premium increase in 139 separate markets throughout the United States.⁴⁰ Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.⁴¹ There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller

³³ In the Department of Insurance, Financial Institutions, and Professional Registration, State of Missouri. In Re: Aetna Life Insurance Company (NAIC # 60054), Aetna Health Insurance Company (NAIC # 72052), Case No. 120730479C.

³⁴ Boris Ladwig, *Feds fine Humana \$3.1 million for Medicare violations*, INSIDER LOUISVILLE (Mar. 9, 2016 7:00 AM), <http://insiderlouisville.com/business/feds-fine-humana-3-1m-for-medicare-violations/>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See, e.g., Leemore Dafny, *supra* note 21.

³⁹ David Lazarus, *As Health insurers merge, consumers’ premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), <http://www.latimes.com/business/la-fi-lazarus-20150710-column.html>.

⁴⁰ Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

⁴¹ Guardado *et al.*, *The Price Effects of a Large Merger of Health Insurers: A Case Study of United-Sierra*, 1(3) HEALTH MANAGEMENT, POL’Y & INNOVATION 1 (2013).

insurers competing in the same state.⁴² Studies show that cost savings from reduced payments to providers are not passed on to consumers.⁴³ There are also studies showing that, conversely, increasing competition leads to lower premiums.⁴⁴ **In contrast, we are not aware of any economic studies or evidence indicating that insurance mergers lead to lower prices for consumers.**

Current market regulations will not deter an insurer from raising consumer costs. Unlike most other states, Missouri does not have a system for rate review and approval. So there is no effective means to stop the merged insurer from exercising its market power by charging higher premiums.

Some supporters of this merger have argued that the medical loss ratio (“MLR”) will limit the level of insurer profits thus protecting consumers from price increases.⁴⁵ While MLR is an important tool that requires health insurers to spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm.⁴⁶ MLR, as health antitrust expert Professor Jamie King has observed, “does not guarantee that dominant insurers will not raise premiums and as such, it is not a substitute for the pressures toward lower costs and higher quality created by a competitive market.”⁴⁷

III. Merger Efficiencies Are Unlikely, and Will Not Overcome the Competitive Harm

The merging parties have not fully documented their claimed efficiencies but have generally stated that their merger would create substantial efficiencies leading to improved health care quality and lower costs for consumers.⁴⁸ It is for DIFP to carefully examine these claims and determine if they are fully substantiated.⁴⁹ However, the law is clear that efficiencies, even if

⁴² Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), available at <http://techscience.org/downloadpdf.php?paper=2015081104>.

⁴³ Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience, The Commonwealth Fund (Sep. 20, 2015), available at <http://www.commonwealthfund.org/publications/issue-briefs/2015/nov/evaluating-insurance-industry-consolidation>.

⁴⁴ E.g., Steven Sheingold, Nguyen Nguyen, and Andre Chappel, *Competition and Choice in the Health Insurance Marketplaces, 2014-2015: Impact on Premiums*, ASPE Issue Brief (July 27, 2015), available at https://aspe.hhs.gov/sites/default/files/pdf/108466/rpt_MarketplaceCompetition.pdf,

⁴⁵ See generally *Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Mark T. Bertolini, Chairman & CEO of Aetna, Inc.), available at <http://www.aetnaandhumana.com/wp-content/uploads/2015/09/Bertolini-House-testimony9-29-15-v1.pdf> (noting that the merger will lead to “lower costs.”).

⁴⁶ See Letter to Commissioners Ted Nickel and Katherine Wade, American Hospital Association (Feb. 23, 2016), available at http://media.wix.com/ugd/1859d0_fe3f35a629c1411b8522c232258f8576.pdf.

⁴⁷ *Effects on Competition of Proposed Health Insurer Mergers: Hearing Before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Jamie S. King, Professor University of California, Hastings College of Law), available at https://judiciary.house.gov/hearings/?Id=020363B9-F9EF-4623-8E67-28A0B260675A&Statement_id=30A83B11-7A89-4261-9773-DCF6593808FF.

⁴⁸ See Bertolini, *supra* note 45 (section labeled “Benefits of the Acquisition for Consumers and Providers.”).

⁴⁹ The DIFP should be especially skeptical of claims that new entry can resolve competitive concerns. Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks as Prepared for American Bar

proven, do not count unless (1) they clearly outweigh the anticompetitive effects, (2) it is necessary for the insurers to merge to achieve the stated efficiencies, and (3) the stated efficiencies will actually benefit consumers.⁵⁰

A critical question to be examined is why is this merger necessary in order to achieve any of the potential efficiencies the merging insurers refer to. Both of these companies already have tremendous resources and expertise. Having an opportunity to combine that with a competitor's resources and expertise is not a basis to permit the companies to merge. For example, in *FTC v. St. Luke's*, an important recent case on efficiencies, a dominant hospital wanted to acquire a physician practice 60 miles away. Their claimed efficiencies mostly revolved around being able to move the physician practice onto their computer system, which would allow them to better integrate their care.⁵¹ The Ninth Circuit was explicit that "the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations."⁵² It is not a legitimate efficiency if Aetna or Humana want to merge simply to improve their operations. Working to compete by matching or exceeding your rival's operations is what the American competitive free market system is based on; Aetna and Humana don't need a merger to accomplish that.

The parties have claimed significant cost-savings associated with the merger. According to Aetna, its merger with Humana would create \$1.25 billion in "synergy opportunities" and "operating efficiencies."⁵³ However, while the merging insurers have offered little details about these supposed savings, the bigger question is if consumers would see any benefit themselves from these savings, if they do result, in the form of lower costs or greater value. There is no evidence or scholarly studies showing that insurance mergers lead to savings for consumers. In fact, as previously noted, evidence indicates that health insurance mergers lead to higher consumer costs, not increased consumer savings.⁵⁴ Former Assistant Attorney General Bill Baer from the DOJ's Antitrust Division, now acting Associate Attorney General, raised questions regarding the alleged cost efficiencies that would result from health insurance mergers. Baer noted that "consumers do not benefit when sellers . . . merge simply to gain bargaining leverage."⁵⁵

Association/American Health Lawyers Association Antitrust Healthcare Conference (May 24, 2010), *available at* <https://www.justice.gov/atr/speech/antitrust-and-healthcare> ("[E]ntry defenses in the health insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger.").

⁵⁰ Horizontal Merger Guidelines, *supra* note 9 at § 10 (to rebut a presumption of competitive harm, efficiencies must be merger-specific, cognizable, and substantiated); *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 789 (9th Cir. 2015) (efficiencies must demonstrably prove "that a merger is not, despite the evidence of a *prima facie* case, anticompetitive").

⁵¹ *St. Alphonsus Medical Center-Nampa et al v. St. Luke's*, 778 F. 3d 775, 791 (9th Cir. 2015).

⁵² *Id.* at 792.

⁵³ Press Release, Aetna, Aetna to Acquire Humana for \$37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care (July 3, 2015), *available at* <https://news.aetna.com/news-releases/aetna-to-acquire-humana-for-37-billion-combined-entity-to-drive-consumer-focused-high-value-health-care/>.

⁵⁴ See Section II.

⁵⁵ Speech by Assistant Attorney General Bill Baer, Remarks as Prepared for the Delivery at The New Health Care Industry Conference: Integration, Consolidation, Competition in the Wake of the Affordable Care Act at Yale University (Nov. 13, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-new-health-care-industry-conference>.

That makes sense. And there is no evidence that these large insurers are at a point where another merger would help them achieve any legitimate economies of scale. And there is little evidence that consumers would ever actually benefit from giving these insurers increased bargaining power. In fact, Professor Thomas Greaney, a health antitrust scholar, has noted that there is actually “little incentive [for an insurer] to pass along the savings to its policyholders.”⁵⁶ As Consumers Union has suggested, a more likely result would be fewer choices for consumers, and providers being pressured to cut corners on quality of care in order to meet the insurer’s demands – the opposite of what consumers need.⁵⁷ The American Antitrust Institute, the leading non-profit antitrust think tank, recently concluded that economic studies and evidence indicate that “consumers do not benefit from lower healthcare costs through enhanced bargaining power.”⁵⁸

A more abstract argument raised by the merging insurers is that the merger will allow for more innovation. Innovation in health care delivery can be very beneficial and should be encouraged. For one thing, there is the effort to change health care from the current volume-based system to a patient-oriented, value-based delivery model that incentivizes insurers and providers to improve care and lower costs. But we are concerned that, in Missouri, the merger would increase and entrench the combined insurer’s market power, reducing its incentives to compete and improve care. As noted by the American Antitrust Institute, excessive concentration created by the proposed merger *is likely to reduce incentives* for engaging in pro-consumer innovation.⁵⁹

Furthermore, the insurers have not offered any convincing details or analysis demonstrating how innovation would improve post-merger. In fact, reviewing their testimony and data, Professor Dafny found speculative their claims that the mergers would enhance their ability to develop and implement new value-based payment agreements, noting that there was no evidence that mergers are required in order to carry out such initiatives.⁶⁰ Moreover, Professor Dafny has further noted that statistical evidence shows concentrated insurance markets often have less innovative insurance product offerings, meaning mergers between insurers will not likely lead to higher quality or more innovative insurance products.⁶¹

⁵⁶ See Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), <http://healthaffairs.org/blog/2015/07/16/examining-implications-of-health-insurance-mergers/>.

⁵⁷ See *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. (Sept. 22, 2015) (testimony of George Slover, Consumers Union), available at <http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Slover%20Testimony.pdf> (“[b]ut a dominant insurer could force doctors and hospitals to go beyond trimming costs, to cut costs so far that it begins to degrade the care and service they provide below what consumers value and need”).

⁵⁸ Letter from the American Antitrust Institute, Thomas Greaney, and Diana Moss, to William J. Baer, Assistant Attorney General Dep’t of Justice (Jan. 11, 2016), available at http://www.antitrustinstitute.org/sites/default/files/Health%20Insurance%20Ltr_1.11.16.pdf.

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights* at 15-16, 114th Cong. (Sept. 22, 2015) (testimony of Leemore Dafny), available at <http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Dafny%20Testimony%20Updated.pdf>.

⁶¹ Leemore Dafny and Christopher Ody, *New Health Care Symposium: No Evidence That Insurance Market Consolidation Leads To Greater Innovation*, Health Affairs Blog (Feb. 24, 2016), <http://healthaffairs.org/blog/2016/02/24/no-evidence-that-insurance-market-consolidation-leads-to-greater-innovation/>.

IV. Divestitures and Other Remedies

As part of its review of the proposed merger, DIFP should consider what actions would help properly protect consumers and ensure the merger is in the public interest. If the DIFP decides that a merger is not in the public interest, it has the power to disapprove the merger. Indeed, state insurance commissioners have disapproved health insurance mergers in the past, such as Pennsylvania's 2009 decision to deny Highmark's acquisition of Independence Blue Cross.⁶²

In other cases, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation.⁶³ In evaluating any proposed remedy, it is important to remember that the law requires that a remedy must *fully restore* the competition that would otherwise be lost, or must otherwise effectively prevent the harm that would result.⁶⁴

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.⁶⁵ Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company that is fully capable of restoring the same competition. In Missouri, the scope, breadth, and market shares of the merging companies' Medicare Advantage operations is significant. We estimate that Aetna would have to divest over 49,000 lives in various markets. These overlap problems are exacerbated by the also announced merger of Anthem and Cigna. Constructing any remedy involving divestitures may be an extremely difficult task.

It could be a mistake for the DIFP to rely on the DOJ's traditional approach of divestiture. For example, the DOJ has previously used divestitures to resolve competitive concerns from mergers in Medicare Advantage markets. Recent studies by the Center for American Progress and the Capitol Forum found that the divestitures had largely failed to address the competitive concerns, with 2 of the 3 firms failing and a substantial increase in premiums.⁶⁶ Moreover, no remedy in this case could address the loss of potential competition. That is why the American Antitrust Institute has come out against both mergers, urging the DOJ to "just say no."⁶⁷ As noted before that was the approach taken by the Pennsylvania Insurance Commissioner in rejecting the Highmark-Independence Blue Cross merger.

⁶² See *Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#_Vkqhq_mrShc (last visited Jan. 8, 2015).

⁶³ E.g., Consent Order at 8, In the Matter of Application for the Indirect Acquisition of Humana by Aetna, No. 125926-16-C0 (Feb. 15, 2016), available at <http://floir.com/Sections/LandH/AetnaHumanaHearing.aspx>.

⁶⁴ E.g., See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" (citation omitted))

⁶⁵ See, e.g., Revised Final Judgment, *United States v. Aetna Inc. and Prudential Insurance Co. of Am.*, No. 3-99-cv-1398-H (N.D. Tex. Dec. 7, 1999); Final Judgment, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, No. 1:08-cv-00322 (D.D.C. Sept. 24, 2008); Final Judgment, *United States v. Humana Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012).

⁶⁶ Topher Spiro, Maura Calsyn, Meghan O'Toole, Divestitures Will Not Maintain Competition in Medicare Advantage, Center for American Progress (Mar. 8, 2016), <https://www.americanprogress.org/issues/healthcare/report/2016/03/08/132420/divestitures-will-not-maintain-competition-in-medicare-advantage/>.

⁶⁷ Greaney & Moss, *supra* note 58.

Indeed, because of such concerns, DOJ, the Federal Trade Commission (“FTC”), and the courts have rejected divestitures as a remedy in other merger enforcement matters. In their reviews of the proposed mergers of Comcast-Time Warner Cable and Sysco-US Foods, to cite two examples, the enforcement agencies rejected the divestitures offered as remedies, and instead blocked the mergers. When Sysco pursued its merger anyway, the court agreed with the FTC and enjoined the merger.⁶⁸

Regarding health insurance markets, there is little evidence that the benefits of competition are effectively restored after divestitures. In fact, in the previously cited three retrospective studies on health insurance mergers, both matters involved divestitures of covered lives for different insurance products, but the merged companies were still able to raise premiums by significant margins in other products or in other geographic markets.⁶⁹ Additionally, for any divestiture to be successful the purchaser of the assets will need to have and maintain a cost-competitive and attractive network of hospitals and physicians; ensuring this will require scrutiny and continued monitoring from DOJ.⁷⁰ And there is yet another reason why divestitures are not effective in health insurance markets in the long term: what is divested amounts to the contracts with specific policyholders. In the next open season, it is all too easy for a divested policyholder to return to the previous insurer. For all these reasons, it may be difficult to genuinely preserve the competitive benefits of the pre-merger market structure through divesting subscribers or operations to a competitor.

Most recently, the Florida Office of Insurance Regulation (“OIR”) rejected divestitures as a potential remedy in the Aetna-Humana merger.⁷¹ The OIR noted that the divestitures were “not in the best interests of Florida policyholders and also may be short term in nature.”⁷² The OIR noted that such divestitures may “result in unwanted changes in quality of services [and] benefits,” and furthermore, that policyholders can switch insurance every year which would “lessen the effectiveness of divestitures as a means to manage market concentration.”⁷³

While the DOJ (and the Missouri Attorney General’s Office, using its own antitrust authority) may be considering divestitures, the DIFP and Director are empowered to develop additional remedies for a health insurance merger. These remedies can be in addition to any remedies, including divestitures, ordered by the DOJ or the Missouri Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,⁷⁴ but the Nevada Insurance Commissioner required additional remedies. In order for the merging companies to receive approval from the Commissioner, they had to agree that no

⁶⁸ Press Release, DOJ, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and Federal Communications Commissions Informed Parties of Concerns (Apr. 24, 2015), available at <https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department>; see also Press Release, FTC, Following Sysco’s Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/07/following-sycos-abandonment-proposed-merger-us-foods-ftc-closes>.

⁶⁹ Dafny, *supra* note 40; Guardado, *supra* note 41; Spiro *et al*, *supra* note 22.

⁷⁰ See Greaney, *supra* note 56.

⁷¹ Consent Order, *supra* note 63 at 9.

⁷² *Id.* at 8.

⁷³ *Id.* at 9.

⁷⁴ Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

acquisition costs would be passed along to consumers or providers, that there would be no premium increases, that there would be no scaling back of benefits, and that UnitedHealth would take specified actions to limit the number of uninsured within the state.⁷⁵ Even with these additional remedies, the people of Nevada were not fully protected against price increases.⁷⁶

Regulatory remedies can also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.⁷⁷ Nevertheless, such remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event the Aetna-Humana merger is permitted to go forward, here is a short list of possible regulatory steps the DIFP might consider, in addition to the divestitures possibly required by the DOJ, to limit the potential harm to consumers:

- Requiring premium stability or heightened rate control for a number of years post-merger.
- Requiring the merged company to maintain plan benefits and options.
- Improving access to providers throughout the state and within local areas.
- Ensuring that the merged company continues to provide the differentiated insurance products offered previously by the two companies, within the state and local areas, for a number of years.
- Ensuring that consumer access to adequate networks is preserved and strengthened, including in rural and underserved areas.
- Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.
- Requiring the merged company to participate in the Missouri Exchange.

V. Suggested Questions to Pose to the Parties

As you prepare for the upcoming public hearing, below is a non-exhaustive list of questions that Missouri consumers need answers to regarding the impact the proposed merger will have on the marketplace and on consumers:

1. What will be the impact on consumers of the loss of Aetna and Humana as independent alternatives for health insurance coverage?
2. What is the likelihood that Aetna could expand into Missouri Medicare Advantage markets even absent the merger? Why does Aetna need the merger to compete in these markets? Is there any means to remedy the concerns over competition in Medicare Advantage?

⁷⁵ *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), <http://www.nevadabusiness.com/2007/11/healthcare-check-up-the-unitedhealth-group-acquisition-of-sierra-health-services/>.

⁷⁶ Guardado et al., *supra* note 41.

⁷⁷ Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), available at <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf> (conduct remedies can be “too vague to be enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked”); see also Deborah L. Feinstein, *Editor’s Note: Conduct Remedies: Tried But Not Tested*, 26 ANTITRUST at 5, 6 (Fall 2011) (“Divestitures continue to be the remedy of choice—and with extremely rare exceptions—the only remedy for horizontal mergers at both the FTC and DOJ.”).

3. What cost-saving efficiencies can Aetna prove can be reasonably expected in Missouri from the acquisition of Humana? Will Aetna commit to a specified reduction in premiums in Missouri based on those efficiencies? If so, for how long would that commitment endure?
4. We are aware that neither Aetna nor Humana participates in the state health insurance exchange. Will Aetna commit to participating in the exchange if the merger is approved? If so, for how long would that commitment endure?
5. Does Aetna have a plan to remedy the conduct concerning Medicare Advantage-Prescription Drug and Prescription Drug Plans that led to a \$3.1 million fine on Dec. 29th, 2015 against Humana? Has Aetna taken steps to correct the conduct that led to a \$1 million fine on April 16, 2015?
6. It's been reported that the increased buyer power from the merger could drive down reimbursement rates below healthy competitive levels in many markets, which could adversely impact patient care quality and access.⁷⁸ Could a combined Aetna/Humana represent such a significant share of provider revenue in any Missourian geographic market as to potentially become a "must have" network for providers?⁷⁹ How might the merger impact the ability of healthcare providers to serve patients?

Conclusion

The undersigned organizations are concerned about the consolidation within the health insurance industry and its impact on price, access, and quality of care. A merger between two of the largest, most dominant, national health insurers could substantially lessen competition for different insurance products in the State of Missouri. Although the merging companies are claiming various benefits associated with the merger, the credible scholarly evidence suggests that consumers will lose facing higher costs, less choice and diminished quality and innovation.

With the prospect that this merger might go forward, we urge the Missouri Department of Insurance, Financial Institutions, and Professional Registration and the Director to carefully analyze this merger and be ready to consider imposing requirements to protect consumers from harm.

We would be happy to address any of the points raised in this comment. Please do not hesitate to contact us with any questions.

Respectfully submitted,

Empower Missouri
Missouri Budget Project
Missouri Health Advocacy Alliance
Missouri Health Care for All
US PIRG

⁷⁸ *Anthem/Cigna; Aetna/Humana: Ongoing DOJ Physician Interviews Focus on Buyer Power Issues; Capitol Forum Analysis Shows Monopsony Enforcement Risk*, THE CAPITOL FORUM (Mar. 11, 2016), <https://thecapitolforum.com/>.

⁷⁹ We respectfully request that the Office of the Commissioner of Insurance reconsider its decision not to consider the impact of the merger on monopsony power.

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